Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

78-1853

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

– against –

GENERAL TELEPHONE COMPANY OF CALIFORNIA
AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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(Filed: June 8, 1979)

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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

MCDONNELL DOUGLAS CORPORATION,

Petitioners,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on January 2, 1979.

Opinions Below

The Opinion of the United States Court for the Ninth Circuit, which affirmed the decision without written opinion of the United States District Court for the Central District of California (Ferguson, J.), is not officially reported as yet and appears as Appendix A to this petition. Order requesting Defendant to file a supplemental brief responding to plaintiff-appellant petition for rehearing with suggestion for rehearing en banc not officially reported, appears as Appendix B.

The Order denying the petition for rehearing appears as Appendix C. The Order staying issuance of Mandate appears as Appendix D.

Jurisdiction

The judgment of the Ninth Circuit was dated and entered January 2, 1979 (Appendix A). The Orders denying a timely petition for rehearing and suggestion for rehearing en banc were dated and entered on April 25, 1979 (Appendix C). The Order staying issuance of Mandate til June 8, 1979 was entered on May 9, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The jurisdiction of District Court was founded on 28 U.S.C. §§ 1331 and 1332; 47 U.S.C. § 207 and the doctrine of pendent jurisdiction.

Questions Presented

The issues presented to the Ninth Circuit involved questions that are essentially and jurisdictionally important, both in the area of federal taxation and federal communications law. The latter is the central issue of this petition since the Court seems to have mistakenly stylized the facts presented by affidavit in the summary proceedings and has inadvertently narrowed the scope of federal jurisdiction in its attempt to not unnecessarily expand the scope of federal jurisdiction.

The Opinion totally ignored the holding of the 6th Circuit Court of Appeals in *Ward* v. *Northern Ohio Telephone Company*, 300 F.2d 816 (1962), (6th Cir. 1962), when the Opinion holds that despite the fact that General Telephone was declared to be an interstate common carrier, the discrimination provisions of the Federal Communications Act do not apply. The Ward case, *supra*, dealt specifically with the matter before the Court and held even that §§ 201-205 of the Act applied to any carrier which is engaged in intrastate communications even though such carriers engage solely through

physical connection with the facilities of another carrier which is engaged in interstate communication.

Also the Opinion endorsing District Court Judge Weinfeld's opinion in duPont Glore Forgan, v. American Telephone & Telegraph Co., *duPont Glore Forgan, Inc.* v. *Am. Tel. & Tel. Co.*, 437 F. Supp. 1104 to 1131 (S.D.N.Y. 1977), *aff'd. mem.*, No. 77-6148, 6154 (2d Cir., March 17, 1978), *cert. denied*, 47 U.S.L.W. 3327 (U.S. Nov. 13, 1978), totally misunderstood Judge Weinfeld's holding referred to in footnote [2] of this Opinion (Appendix A) which held that the Communications Act of 1934 prohibits discrimination such as is indicated in this case and applies if evidence of discrimination is shown establishing discrimination. Judge Weinfeld stated

> "Plaintiffs refer to the defendants' duties of fairness and nondiscrimination under federal and nondiscrimination under federal and state law; however, they have presented no proof that the defendants have violated the statutes to which they refer."

The Opinion overlooked Judge Weinfeld's ruling involving certification of class action, *duPont Glore Forgan, Inc.* v. *American Telephone & Telegraph Co.*, 69 F.R.D. 481. In this Opinion, Judge Weinfeld stated:

> "The fact that Centrex is, as defendants contend, a local telephone exchange service, subject to the jurisdiction of state and local regulatory authority does not diminish the right of Centrex customers to the claimed exemption and no state regulatory body may override the federal statute which permits the exemption."

In addition to the above, the Opinion, in fact, narrowed federal jurisdiction severely by holding that the practice of General Telephone Company of California, i.e., Practice C200.105 entitled "Billing of Federal Excise Tax," was not a matter of Federal concern, ignoring completely the holding of *Benanti* v. *United States of America*, 355 US 96, 2 L ed 2d 126, 78 S.Ct. 155, Dec. 9, 1957, which held that both in-

trastate and interstate communications come within the scope of Section 605 of the Federal Communications Act in the following language at page 132:

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under § 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications."

The Court in its Opinion also overlooked the exception regarding the applicability of the anti-discriminatory section (§ 202) of the Communication Act of 1934 which makes that section applicable to those carriers that are primarily intrastate described in 47 U.S.C. 152 (b) (2)-(4). This exception, in essence, provides that § 202 entitled "Discrimination and Preferences" is equally applicable to intrastate carriers engaged in interstate communications solely through physical connection with the facilities of another carrier.

Finally, the Opinion severely restricts the often cited holding of *American Trucking, Inc.*, v. *F.C.C.*, 377 F.2d 121 (D.C. Cir. 1966); cert. denied February 27, 1967, 87 S.Ct. 973, which in reference to § 202(a) of the 1934 Act stated:

> "These contentions of the Company are obviously erroneous, it seems to us. The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with 'any' unjust discrimination by 'any' means, or to make 'any' undue preference to 'any' particular person, or to subject 'any' person to 'any' undue prejudice. Moreover it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy."

The above, by way of preliminary statement, shows the overall importance of the holding contained in the Opinion. In a nutshell, this Federal Court of Appeals Opinion if left unchanged will hold that despite federal common law, federal statutes and federal case law, the collection of *federal* excise tax on communications service by General Telephone of California held to be a common carrier by an opinion written by Chief Justice Burger in *General Telephone Co. of California* v. *F.C.C.*, 413 F2d 390 (1969), D.C. Cir. (1969) Cert. denied October 27, 1969, 90 S.Ct. 173, is not within the purview of federal jurisdiction without benefit of trial and in face of admitted genuine issues of fact regarding interstate v. intrastate services.

Statutes Involved

A. *Internal Revenue Code*

"Section 4251(a)(1) of the Internal Revenue Code, 26 U.S.C. § 4251(a)(1), as amended by the Excise Tax Reduction Act of 1965, 79 Stat. 145 (1965), reads:

> 'Except as provided in subsection (b), there is hereby imposed on amounts paid for the following communication services a tax equal to the percent of the amount so paid specified in paragraph (2):
>
> Local telephone service.
> Toll telephone service.
> Teletypewriter exchange service.
>
> The taxes imposed by this section shall be paid by the person paying for the services.'

Section 4252(a) and (d) of the Internal Revenue Code, 26 U.S.C. § 4252(a), (d), read in relevant part:

'(a) Local telephone service.—For purposes of this subchapter, the term 'local telephone service' means—

(1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and

(2) any facility or service provided in connection with a service described in paragraph (1).

The term 'local telephone service' does not include any service which is a . . . 'private communication service' as defined in [subsection] . . . (d).

* * *

(d) Private communication service.—For purposes of this subchapter, the term 'private communication service' means—

(1) the communication service furnished to a subscriber which entitles the subscriber—

* * *

(B) to the use of an intercommunication system for the subscriber's stations,

regardless of whether such . . . intercommunication system may be connected through switching with a service described in subsection (a), (b), or (c),

* * *

except that such term does not include any communication service unless a separate charge is made for such service."

B. *Federal Communications Act of 1934* — (47 U.S.C. §§ 152, 153(e), 202, 206 & 207

§ 152. APPLICATION OF CHAPTER

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except

for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection. June 19, 1934, c. 652, Title 1, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63.

§ 153(e). DEFINITIONS

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not,

insofar as such person is so engaged, be deemed a common carrier.

§ 202. DISCRIMINATIONS AND PREFERENCES

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 202, 48 Stat. 1070; Sept. 13, 1960, Pub. L. 86-751 74 Stat. 888.

§ 206. CARRIERS' LIABILITY FOR DAMAGES

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing

in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. June 19, 1934, c. 652, Title II, § 206, 48 Stat. 1072.

§ 207. RECOVERY OF DAMAGES

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. June 19, 1934, c. 652, Title II, § 207, 48 Stat. 1073.

Statement of the Case

The federal excise tax, paid by Petitioner for which damages are sought in this action, is imposed on communication services by Sections 4251-4254 of the Internal Revenue Code, which sections were substantially amended and revised effective January 1, 1966, by the Federal Excise Tax Reduction Act of 1965, Act of June 21, 1965, P.L. 89-44, 79 Stat. 136 (1965). Section 4251(a) provides that the tax shall be imposed on amounts paid for the use of "local telephone service" as defined in Section 4252(a). Section 4252(a) excludes from the definition of "local telephone service" any

service which is a "private communication service" as that term is defined in Section 4252(d). Section 4252(d), as amended in 1965, defines "private communication service" as the service and equipment furnished to allow intercommunication among a customer's telephone stations, "except that such term does not include any communication service unless a separate charge is made for such service."

PBX including Centrex is within the scope of "private communication service" and thereby is exempt, insofar as it is used for intra-office communication, from the federal excise tax. Section 4252(d)(1)(B) applies to an "intercommunication system for subscriber's stations regardless of whether such * * * intercommunication system may be connected through switching" with the telephone exchange. Likewise, by the inclusion in the definition in Section 4252(d)(2) and Section 4252(d)(3) "switching capacity * * * necessary or unique to the use of intercommunication systems," in the Federal Excise Tax Reduction Act of 1965, Congress clearly contemplated Centrex to be within the exemption.

Congress acted in order to treat all private communication services alike, and gave reasonable time to separate the charges, required for the exemption to be applied to Centrex. In H.R. Rep. No. 433, 89th Congr., 1st Sess. 31 (1965), the report on the Federal Excise Tax Reduction Act of 1965, the House Committee on Ways and Means noted:

> "For the reasons indicated above, your committee's bill provided an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will *immediately* qualify for this exemption. However, it is understood that Centrex systems—where the switching equipment is generally on the premises of the local exchange rather than on that of a subscriber—generally do not, *as yet*, provide for a charge which is separate and distinct from that for local telephone service. *Until* such a separation is made, this exemption, therefore, will not

apply in the case of Centrex service."
(Emphasis added)

Section 4291 of the Internal Revenue Code requires that the operating telephone companies collect the proper amount of the excise tax on communication services. Petitioner does not file excise tax returns. It relies upon General Telephone Company of California to calculate accurately and to collect fairly the proper amount of tax due.

General Telephone Company of California has had the capability of making, or causing to be made, the separation of charges required for exemption under Section 4252(d) at all times since 1961, but they either willfully or negligently failed to do so until August 10, 1971, knowing that the effect of such inaction, after January 1, 1966, was to require Petitioner to pay greater amounts of excise taxes than it would have been obliged to pay had General Telephone Company of California made or caused to have been made, the requisite separation of charges on January 1, 1966 or had Petitioner had any other PBX type service.

Thus, from January 1, 1966 until approximately mid-1971, General Telephone collected, or caused to have been collected an unduly large amount in excise taxes from Petitioner and Petitioner paid the operating telephone company excise taxes which were not in fact due and which, during the same period, were not charged on other PBX systems like the Centrex-PBX system. This fact that the services of other like PBX systems were not taxed by General Telephone was not disputed and is discriminatory in nature.

Reason for Granting the Writ

The Federal Communications Act of 1934, 48 Stat. 1070 (1934), as amended, 47 U.S.C. §§ 201-223, makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination . . . in practices, classifications or regulations . . . for or in connection with like communication service, directly or indirectly by any means or device . . ." In

addition, this Act makes it unlawful for any common carrier "to make or give any undue or unreasonable preference or advantage to any particular person, class of persons . . . to any undue or unreasonable prejudice or disadvantage."

It was clear from the record before the Ninth Circuit Court, particularly General Telephone's own argument that General Telephone did in fact discriminate against Petitioner as a subscriber of Centrex service by failing to separate the charge for that service until late 1971, a period of at least 5-1/2 years. General Telephone, as justification for their actions, cite an interpretation of the legislative history for the Federal Excise Tax Reduction Act of 1965. Their interpretation is that General Telephone was given a license by Congress to tax or not tax depending on how General Telephone views the "opportunity to improve their competitive position."

Petitioner's argument is simple. Section 202 of the Federal Communications Act of 1934 set forth herein has been violated by General Telephone and, such violation entitles Petitioner to damages under Section 206, *Carriers' liability for damages*, and under Section 207, *Recovery of damages*, of the Act.

General Telephone argued and the Opinion in question held that the matter before the Court concerns intrastate commerce and this matter is not subject to the Federal Communications Act of 1934, 48 Stat. 1070 (1934), as amended, 47 U.S.C. §§ 201-223.

As Petitioner has shown in its affidavits submitted to the Circuit Court, this point is not clear, in fact, the service for which the rate is charged, in the case of Centrex, is more clearly interstate in nature. General Telephone admitted that this is a genuine issue of fact. GTC in its affidavit in support of its Motion which the Opinion granted states that "interstate private lines and telephone calls made from a GTC supplied Centrex station are governed by American Telephone and Telegraph Company tariffs on file with the Federal Communications Commission."

GTC is, in essence, stating that Centrex phones and switching equipment are physically connected within the meaning of 47 U.S.C. 152, subparagraph (b) (2)-(4). This statute entitled "Application of chapter" cited by Ninth Circuit's Opinion on Page 8 reads in pertinent parts as follows:

> "b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication *solely through physical connection with the facilities of another carrier* not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . *except that sections 201-205 of this title shall, except as otherwise provided therein,* apply to carriers described in clauses (2)-(4) of this subsection. June 19, 1934, c. 652, Title I, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63."
> (Emphasis added)

Petitioner's affidavit which Respondents did not contradict or move to strike states as follows:

> "7. In order to clearly understand Mr. Hester's Affidavit II, it should be noted that the Centrex telephones and switching equipment provided to McDonnell Douglas by GTC are arranged to make and receive telephone calls, internal to the Centrex system, within the local exchange, intrastate calls and interstate calls both over the national telephone dial system and over intrastate or interstate private tielines. Interstate toll telephone calls made from GTC supplied Centrex stations are billed by GTC based on AT&T tariffs on file with the Federal Communications Commission. A Centrex station is common to all telephones within the national telephone dial system (both intrastate and interstate) and is indivisable of other telephone company plant and facilities used for interstate telephone calls. *The rate charged by GTC for a Centrex station includes a charge for the switching and recording equipment designed for and used to identify all telephone calls placed beyond the local telephone exchange.* GTC refers to this basic feature of their Centrex service as "station identification of outward dialed calls".

> "4. The General Telephone Company PBX system used by MDC at Huntington Beach prior to the Centrex system's installation was not taxed on the intrasystem service. When MDC subscribed to the Centrex service, that service, *utilizing the same intrasystem equipment with the exception of the switching vehicle which was removed from our premises to General Telephone Company's premises, was totally taxed.* The switching vehicle was dedicated totally to MDC utilization and, to my knowledge is, at this time, totally utilized by MDC. Subsequent to the installation of the Centrex system, MDC was taxed by General Telephone Company on its total Centrex bill including that service which included utilization of the same telephones which had formerly been used with the PBX system."

Section 202 provides that unjust discrimination and preferences are unlawful "for any common carrier". The Act defines a common carrier at 47 U.S.C. § 153 (6) as follows:

> "h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Jurisdiction under the Federal Communications Act has been applied by the federal courts to telephone companies in

the instance when telephone companies had all of their facilities located in one state and which were engaged in intrastate telephone communications except for physical connection with carriers in other states.

In Ward v. Northern Ohio Telephone Company, 300 F.2d 816 (1962), (6th Cir. 1962), the court explained its jurisdiction under these circumstances as follows:

> "Appellee telephone company contends that it does not come under Title 47 U.S.C.A. §§ 206 and 207, heretofore referred to, which provide for the carrier's liability for damages and suit for recovery thereof, since it is not a 'common carrier', subject to the provisions of this chapter, and that it is subject to the Act only for accounting and reporting services. Appellee further submits that the foregoing statutory sections do not apply to it, as it carries on only intrastate business.
>
> When we examine the above-mentioned exception in the statute, we find that Sections 201-205 of the Act, relating to services, charges, unlawful discriminations, and preferences apply to any carrier, which is engaged in interstate communication solely through physical connection with the facilities of another carrier, or to any carrier, which is engaged in interstate communication solely through connection by radio, or by wire and radio with facilities of another carrier located in an adjoining state."

The Opinion as it now stands incorrectly adopts General Telephone's position without trial on "the apparent fact that none of the disputed charges here were for calls made from Centrex phones into interstate nets", footnote [3] p. 10 of Opinion. The record simply does not support such a statement. Centrex and PBX phones make calls in-plant and to every area of the globe.

This case involves the power to impose or not to impose a federal tax, an undeniable national question. The tax is a

burden on communications services, both intrastate and interstate. As Chief Justice Burger pointed out in *General Telephone Co. of Calif.* v. *F.C.C., supra,* "The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of our organic whole . . ."

Conclusion

Petitioner respectfully requests this Court to grant certiorari and upon that grant, to reverse the judgment below and allow a trial on the issue of discrimination under the Communication Act of 1934 or remand the case for a determination of damages.

Dated: Long Beach, California
June 8, 1979

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U. S. COURT OF APPEALS

MCDONNELL DOUGLAS CORPORATION Plaintiff-Appellant v. GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE AND ELECTRONICS CORPORATION Defendant-Appellee	NO. 75-3131 OPINION

Appeal from the United States District Court
for the Central District of California

Before: CARTER and HUFSTEDLER, Circuit Judges, and C. WILLIAM KRAFT, JR., District Judge.*

CARTER, Circuit Judge:

McDonnell Douglas appeals here from an order granting General Telephone's[1] motion for summary judgement in a suit in which McDonnell sought to recover excise taxes paid over a five and one-half year period on telephone services provided by General Telephone. The thrust of the district court's order was that McDonnell had failed to state any cause of action under applicable federal statutory or common law.

McDonnell's appeal presses the view that at least three causes of action were stated: First, General Telephone's collection of excise taxes between 1966 and 1971 violated a

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*Honorable C. William Kraft, Jr., Senior District Judge, Eastern District of Pennsylvania, sitting by designation.

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duty imposed on General Telephone by the Federal Excise Tax Reduction Act of 1965, 26 U.S.C. §§ 4251-4254 ("the 1965 Act") to conduct its billing practice so as to confer the benefits of the Act on its customers, including McDonnell. Second, General Telephone's billing practice was discriminatory as to McDonnell and thus violated the anti-discrimination provisions of the Federal Communications Act of 1934, 47 U.S.C. § 202 as amended ("the 1934 Act"). Finally, McDonnell argues that General Telephone violated a fiduciary duty owed to its customers, including McDonnell, when it established and carried out the particular billing practices which resulted in McDonnell's having to pay the disputed excise taxes.

General Telephone argues in support of the district court that no cause of action was stated, and also contends that, as to the claim based on discrimination arising out of the 1934 Act, a statute of limitations would preclude recovery anyway. It also argues that it is not a proper party from whom McDonnell should seek a refund of taxes. Rather, section 7422(f)(1) of the Internal Revenue Code, 26 U.S.C. § 7422(f)(1) requires that such action be brought only against the United States.

We find that McDonnell has failed to state any cause of action under the federal statutes cited and under the common law. We therefore affirm the decision of the lower court.

I. FACTS

McDonnell is a long-time customer of General Telephone Company of California, a wholly-owned subsidiary of co-appellee General Telephone and Electronics Corp. During the time period relevant to this dispute, McDonnell subscribed to

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at least two different kinds of telephone service from General Telephone: conventional service which gave McDonnell access to the world-wide commercial telephone communications net available to telecommunications users generally, and a private branch exchange (PBX) system which facilitated McDonnell's internal communications. General Telephone apparently offered PBX systems in different modes, one of which was called "CENTREX" and which was used by McDonnell in its internal communications.

The seeds of this dispute were sown in 1965 when Congress amended the Internal Revenue Code to exempt "private communications service" from federal communications excise taxes. Federal Excise Tax Reduction Act of 1965, 46 U.S.C. §§ 4251-4254. Under these amendments, PBX systems were intended to qualify for the tax exemption, but only if customers were billed separately for internal and external use. See H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677. CENTREX services received by McDonnell were billed together with conventional telephone services and for that reason, they did not immediately qualify for the exemption. The present dispute matured when General Telephone finally separated its CENTREX and conventional charges at McDonnell's request--five and one-half years after the Excise Tax Reduction Act became effective--but declined to reimburse McDonnell for the taxes paid during that period.

II. ISSUES

A. Does the Excise Tax Reduction Act of 1965 impose a duty upon General Telephone to change its billing practice so as to confer the benefits of the Act on McDonnell?

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B. Is General Telephone's billing practice with respect to CENTREX service subject to federal scrutiny so as to give rise to a cause of action under the Federal Communications Act of 1934 where discrimination is alleged? If so, does a statute of liminations bar recovery?

C. Does General Telephone owe a separate common law fiduciary duty to McDonnell to formulate billing policies that would minimize McDonnell's excise taxes?

D. Is General Telephone the proper party from whom McDonnell should seek recovery of the money paid as federal excise taxes?

III. DISCUSSION

A. The 1965 Act

Insofar as it applies to the facts of this case, the 1965 Act provides for an excise tax on local telephone service (26 U.S.C. § 4251(a)(1)), but excludes from coverage of the tax "private communications services . . . [if] a separate charge is made for such service." 26 U.S.C. § 4252(a), (d). Thus McDonnell's CENTREX service was taxed because it was billed to McDonnell along with charges for conventional service. It is clear that Congress contemplated such a result when it passed the 1965 Act. The legislative history of the bill, found in H.R. Rep. No. 433, 89th Cong. 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645 at 1677 states:

> "It is understood that private lines and PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems--where switching equipment is generally on the premises of the local exchange rather than on that of the subscriber--generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such separation is made, this exemption, therefore, will not apply in the case of Centrex service."

McDonnell argues that there is implicit in the Act and its legislative history a duty placed upon utilities providing telephone service to separate charges for CENTREX services so that they qualify for the exemption. It supports this argument with the observation that if the Act does not impose such a duty, then it confers upon General Telephone and other utilities excessive discretion to determine whether or not its customers have to pay federal excise taxes. It looks at the words "as yet" and "until" in the text of the legislative history and contends they should be interpreted so as to require a change in a utility's billing practice if the service to which a customer subscribes does not qualify for the exemption.

Essentially identical arguments were made in DuPont Glore Forgan, Inc. v. Am. Tel. & Tel. Co., 437 F. Supp. 1104 at 1131 (S.D.N.Y. 1977), aff'd mem., No. 77-6148, 6154 (2d Cir., March 17, 1978), cert. denied, 47 U.S.L.W. 3327 (U.S. Nov. 13, 1978) (No. 78-317). In the portion of that opinion directly applicable to this claim, and with which we generally agree,[2] Judge Edward Weinfeld noted that neither the language of the Act nor the legislative history evidence a clear imposition of a duty to establish separate charges for CENTREX service. Furthermore, making a taxpayer's tax liability dependent upon the actions of one of the parties to a particular taxable transaction is not uncommon under the Internal Revenue Code. It follows, therefore, that General Telephone's discretion to separate or not separate CENTREX charges was absolute under the 1965 Act.

In light of Judge Weinfeld's discussion of this issue in 437 F. Supp. at 1131-34, we find it unnecessary to elaborate or cite further authority. We merely hold, consistent with that decision, that the 1965 Act does not impose a duty upon General Telephone to separate charges for CENTREX services from charges for normal telephone services in its bills to McDonnell.

B. The 1934 Act

McDonnell next claims that General Telephone's billing practice violated the anti-discrimination provisions of the 1934 Federal Communications Act, 47 U.S.C. § 202. That section provides as follows:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The discrimination here, McDonnell contends, lies in the fact that its CENTREX costs were higher than fees paid by other customers of General Telephone who received similar service but happen to have subscribed to a P.B.X. system which was billed separately and thus not subject to the excise tax.

General Telephone counters with the argument that CENTREX service, being entirely intrastate in nature, is exempt from the coverage of the Act under section 152(b) of the Act, which excludes "charges, classifications, practices, services, facilities, or regulations for or in connection with intra-

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state communication service by wire or radio of any carrier[.]" This provision was clearly intended to give states significant power to regulate wire communications that are wholly intrastate in nature. In the debates which preceeded passage of the 1934 Act, Senator Dill, the Senate manager of the bill, stated, apparently with reference to § 152:

> "We have attempted . . . to reserve to the State commissions the control of intrastate telephone traffic [in contrast to the jurisdiction left to the states over intrastate commerce following Houston, E. & W.T. Ry. v. United States, 234 U.S. 342 (1914).] . . .
>
> "We have attempted, in this proposed legislation, to safeguard State regulation by certain provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply. . . . " 78 Cong. Rec. 8823 (1934).

Subsequent decisions interpreting the Act have sought to preserve state control against federal jurisdictional encroachment. See Kitchen v. F.C.C., 464 F.2d 801 (D.C. Cir. 1972); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 494, n. 6 (2d Cir. 1968); United States v. State Corporation Comm'n, 455 F. Supp. 843 (E.D. Va. 1972), aff'd 409 U.S. 1094 (1973).

We do not wish to unnecessarily expand the scope of federal jurisdiction in this area when it was the clear intent of Congress and other courts to limit that jurisdiction.

Counsel for McDonnell has forcefully and ably argued that what is involved here is not simply intrastate services, as to which the California Public Utilities Commission has exclusive jurisdiction in the first instance, but rather the discriminatory manner in which General Telephone carried

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out its congressionally mandated duties as a collector of federal excise taxes on those intrastate services. This, it is contended, places what might otherwise be services excluded from the coverage of the 1934 Act under § 152 of that Act back under its coverage because of the federal interest and involvement in the collection of the excise taxes. We find the argument tempting but unpersuasive.

Comparing the language of sections 202 and 152, we note that the language which defines the scope of coverage of the two sections is virtually identical. Section 202 prohibits discrimination in "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services", and section 152 excludes from coverage of the Act all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services". If, as McDonnell contends, General Telephone's tax collection practices were in violation of § 202 because they constituted "charges, practices, . . . regulations, . . . or services" relating to communications, then it would be inconsistent to argue that those same tax collection practices are not "charges, . . . practices, services, . . . or regulations" relating to intrastate communications services, because CENTREX was almost certainly solely intrastate.[3]

We hold, therefore, that McDonnell has stated no valid claim for damages based on discrimination under the 1934 Act. In light of this holding, it is unnecessary to consider the effect of the statute of limitations found in 47 U.S.C. § 415(b), which General Telephone claims precludes recovery.

C. Fiduciary Duty

McDonnell's third claim is based on the theory that General Telephone's position as a public utility and as the author of the billing practices in question gives rise to

fiduciary duties owed to its customers which it breached by collecting unnecessary excise taxes from McDonnell for five and one-half years.

McDonnell cites no case authority for the proposition that a public utility such as General Telephone owes a special fiduciary duty to customers from whom it collects taxes on behalf of the government. There are, however, cases which stand for the proposition that no such fiduciary relationship exists. Agron v. Illinois Bell Telephone Co., 325 F. Supp. 487 (N.D. Ill. 1970), rev'd on other grounds, 449 F.2d 906 (7th Cir. 1971), cert. denied, 405 U.S. 954 (1972); Jacob Goodman & Co. v. New York Telephone Co., 285 App. Div. 404, 137 N.Y.S.2d 797 (1st Dep't), aff'd, 309 N.Y. 258, 128 N.E.2d 406 (1955).

McDonnell derives most of the force of its argument from its interpretation of the Federal Excise Tax Reduction Act of 1965 and from the Federal Communications Act of 1934, discussed above. We see no reason to bootstrap from those two statutes and create a third cause of action in addition to the two already alleged. We therefore affirm that part of the lower court's order dealing with a claim for relief based on an alleged fiduciary duty owed by General Telephone to McDonnell.

IV. CONCLUSION

The order of the lower court is affirmed in all respects. It is therefore unnecessary to deal with General Telephone's contention that it is not to proper party from whom to seek the return of overpaid excise taxes.

FOOTNOTES:

[1] Although both General Telephone Company of California and General Telephone and Electronics Corporation were defendants below and are appellees here, our action affects both in the same way, and they will therefore be referred to under the collective term of "General Telephone".

[2] A portion of Judge Weinfeld's opinion hints that the plaintiff there had failed to make a valid claim for relief under § 202 of the 1934 Act (47 U.S.C. § 202). 437 F. Supp. at 1131, 1134. It is unclear whether he meant that any action which was not violative of the 1965 Act also met the anti-discrimination provisions of the 1934 Act, or whether plaintiff there merely failed to make the requisite pleadings and proof to persuade the judge of the merits of its claim. We do not rely on that portion of Judge Weinfeld's opinion in our discussion of the 1934 Act.

[3] We are also unpersuaded by McDonnell's contention that CENTREX is not intrastate service because of the capacity it possesses to be patched into interstate telecommunications nets. Aside from the apparent fact that none of the disputed charges here were for calls made from CENTREX phones into interstate nets, the theory which McDonnell tries to develop is inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services. If CENTREX service of the type described here becomes interstate merely because it can be connected with other wire systems that are interstate, then it is difficult to imagine what type of telephone service would not qualify as interstate in a similar manner. The lessons of Kitchen and State Corporation Comm'n, supra, suggest McDonnell's argument should be

discarded, and we do so in light of the facts presented here.

We are likewise unpersuaded by McDonnell's argument that, because General Telephone was declared to be an interstate common carrier in General Telephone Co. of California v. F.C.C., 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), the antidiscrimination provisions of § 202 of the Act apply here. This misses the point. A carrier may be an interstate "common carrier" within the meaning of § 202 in some instances but not in others, depending on the nature of the activity which is subject to scrutiny. Otherwise, § 152 has little meaning. See National Ass'n of Reg. Util. Com'rs v. F.C.C., 533 F.2d 601 (D.C. Cir. 1976).

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 16 1979
EARL E. MELEN, JR. CLERK
U. S. COURT OF APPEALS

MCDONNELL DOUGLAS CORPORATION, Plaintiff-Appellant, v. GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE AND ELECTRONICS CORPORATION, Defendant-Appellee.	No. 75-3131 O R D E R

Before: CARTER, Circuit Judge.

Defendant-appellee General Telephone Company of California is requested to file a supplemental brief responding to plaintiff-appellant McDonnell Douglas' petition for rehearing with suggestion for rehearing en banc, and particularly to the following issue, namely, whether the characterization of CENTREX service as intrastate within the meaning of section 152 of 47 U.S.C. is a disputed question of fact.

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8-23-71—10084—6048

APPENDIX C

FILED
APR 25 1979
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

McDONNELL DOUGLAS CORPORATION, Plaintiff-Appellant, v. GENERAL TELEPHONE COMPANY OF CALIFORNIA and General Telephone and Electronics Corporation, Defendants-Appellees.	No. 75-3131 ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Before: CARTER and HUFSTEDLER, Circuit Judges, and KRAFT, District Judge.

The panel in the above entitled case having voted unanimously to deny the petition for rehearing; and the suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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APPENDIX D

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 9 1979
EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

McDONNELL DOUGLAS CORPORATION,

Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA and GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Defendants-Appellees.

No. 75-3131

ORDER STAYING ISSUANCE OF MANDATE

Before: CARTER, Circuit Judge

Upon the application of James J. Foley, Esq., counsel for the appellant herein, IT IS ORDERED that the issuance of the certified copy of the judgment of this Court in the above cause be stayed pending the filing of a petition for writ of certiorari to the Supreme Court of the United States, provided such petition is filed in the Clerk's Office of the Supreme Court on or before June 8, 1979.

FOR THE COURT:
by direction

Emil E. Melfi

EMIL E. MELFI, JR.
Clerk of Court